(2)

No. 07-672

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IN THE

Supreme Court of the United States

LISA MILLER-JENKINS,

Petitioner,

v.

JANET MILLER-JENKINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Petition should be granted, where the decision below dismissing the Petition for Appeal rested on an independent and adequate state procedural ground, thus precluding the exercise of *certiorari* jurisdiction?

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the courts of last resort of the two states involved are fully in agreement with one another?

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INTRODUCTION

The Petition for Writ of *Certiorari* ("Petition") should be denied because the decision below dismissing the Petition for Appeal rested on an independent and adequate state procedural ground. Additionally, the Petition should be denied because Petitioner has presented no "compelling reasons" for a Writ of *Certiorari* to be granted. *See* Sup. Ct. R. 10.

This is an interstate child custody dispute that presents the straightforward question of whether Virginia or Vermont courts have jurisdiction over custody and visitation proceedings pertaining to the minor child, IMJ. On November 28, 2006, a panel of the Court of Appeals of Virginia ("Court of Appeals") held that Vermont had sole jurisdiction over the matter under the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C.A. § 1738A. *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 98, 637 S.E.2d 330, 335 (2006). On January 19, 2007, the Court of Appeals denied Petitioner's request for a rehearing en banc. (Pet. App. 57a-58a.)[1] Petitioner then sought to appeal the Court of Appeal's decision to the Supreme Court of Virginia. However her petition for appeal to the Supreme Court of Virginia was dismissed because Petitioner failed to follow the rules for perfecting her appeal: "[f]inding that the appeal was not perfected in the manner provided by law because the appellant failed to file the notice of appeal, the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:14(a)." (Pet. App. 20a-21a). Consequently,

1. Citation is made to the Petition as (Pet. _page no.__) or to the pages of the appendix included in the Petition as (Pet. App. __page no.__).

the Petition for Writ of Certiorari ("Petition") should be denied because the decision below dismissing the Petition for Appeal rested on an independent and adequate state procedural ground.

In addition, Petitioner has failed to establish that there is any "compelling reason" for a Writ of *Certiorari* to be granted. Like the Court of Appeals, a unanimous Supreme Court of Vermont has also concluded that, under the PKPA, Vermont has sole and continuing jurisdiction over this custody matter—a decision this Court already has declined to review. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), *cert. denied*, 127 S. Ct. 2130 (2007). Thus the state courts of last resort are in agreement on this issue, presenting no grounds for a grant of *certiorari*. *See* Sup. Ct. R. 10(b).

For these reasons, the Petition should be denied.

STATEMENT OF THE CASE

This case began in November 2003, when Petitioner Lisa Miller-Jenkins ("Lisa"), filed a complaint in the Rutland County Family Court in Vermont ("Vermont Court"), to dissolve her Vermont civil union with Respondent Janet Miller-Jenkins ("Janet"), and to adjudicate the parental rights and responsibilities over the couple's child, IMJ. In June 2004, the Vermont Court issued a Temporary Custody Order granting Lisa primary physical custody over IMJ and granting Janet visitation rights. Rather than comply with the June 2004 order of the Vermont Court, Lisa filed a new action in the Frederick County Circuit Court in Virginia ("Virginia Circuit Court"), asking that court to rule that she was

the sole parent and the only person with custodial and other parental rights over IMJ.

The Vermont Court continued to exercise its jurisdiction over the custody and visitation issues and ultimately determined that both Janet and Lisa were legal parents of IMJ, and that Lisa was in contempt of court for refusing to allow Janet visitation with the couple's daughter. On August 4, 2006, a unanimous Supreme Court of Vermont affirmed the Vermont Court's orders. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), *cert. denied*, 127 S. Ct. 2130 (2007). From that decision, Lisa sought a writ of *certiorari* from this Court, which was denied on April 30, 2007. *Id.*

In response to Lisa's action in Virginia, on October 15, 2004, the Virginia Circuit Court dismissed out of hand Janet's jurisdictional objections under the Parental Kidnapping and Prevention Act ("PKPA"), 28 U.S.C. § 1738A, and under Virginia law, ruling that Lisa was the only parent of IMJ and that neither Janet "nor any other person has any claims of parentage or visitation rights over [IMJ]."

Janet appealed that decision and, on November 28, 2006, Virginia's intermediate appellate court, the Court of Appeals of Virginia ("Court of Appeals") unanimously reversed the Virginia Circuit Court's assumption of jurisdiction in the case, holding that Vermont had sole jurisdiction over the case pursuant to controlling federal law. In a comprehensive, published opinion, the Court of Appeals applied the jurisdictional criteria in the PKPA to find that Vermont had been IMJ's "home state" within six months of Lisa's filing the Vermont petition and that

Vermont continued to exercise jurisdiction over the case. Accordingly, "the [Virginia] trial court lacked authority to exercise jurisdiction based upon Lisa's custody and visitation action in Virginia or to modify the custody and visitation orders of the Vermont court." *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 98, 637 S.E.2d 330, 335 (2006). The Court of Appeals also directed the Circuit Court "to extend full faith and credit to the custody and visitation orders of the Vermont court." *Id.* at 103, 637 S.E.2d at 338. On January 19, 2007, the Court of Appeals denied Lisa's petition for rehearing *en banc.* (Pet. App. 57a-58a.) Lisa sought to appeal to the Supreme Court of Virginia, but her appeal was dismissed on May 7, 2007, for her failure properly to perfect her appeal pursuant to the Rules of the Supreme Court of Virginia. (Pet. App. 20a-21a).

REASONS FOR DENYING THE PETITION

I. Because The Decision Below Rested On An Independent And Adequate State Procedural Ground, The Petition Should Be Denied.

Lisa's Petition should be denied because the decision below dismissing her Petition for Appeal rested on an independent and adequate state procedural ground, thus precluding this Court from taking certiorari jurisdiction.

While Lisa details her substantive arguments over many pages of her Petition, she omits any discussion of how her Petition could be properly granted when her underlying appeal was dismissed on an independent and adequate state procedural ground—namely Lisa's failure properly to perfect her appeal to the Supreme Court of

Virginia. Lisa attempts to explain away this dispositive fact in a footnote, arguing that the Clerk of the Supreme Court of Virginia's "interpretation of the rules does not appear anywhere in writing and is contrary to the face of the rules." (Pet. 2 n.1.) The simple fact, however, is that Lisa did not comply with the Rules of the Supreme Court of Virginia as understood and applied within that jurisdiction, and her petition for appeal was therefore dismissed.

On November 28, 2006, a unanimous panel of the Court of Appeals held that under the PKPA, Vermont had sole jurisdiction over the custody matter that Lisa had first initiated in Vermont. On January 19, 2007, the Court of Appeals denied Lisa's petition for rehearing en banc. (Pet. App. 57a-58a.) Under Supreme Court of Virginia Rules 5:14 and 5:17, in order to pursue an appeal to the Supreme Court of Virginia, Lisa was required **both** to file her notice of appeal in the Court of Appeals, **and** to file her petiton for appeal in the Supreme Court of Virginia by February 20, 2007, 30 days after the denial of rehearing. Lisa did neither. She did not file a notice of appeal at all. The Supreme Court of Virginia rejected her petition for appeal on that ground, clearly and succinctly stating that it was dismissing the appeal due to Lisa's procedural default: "[f]inding that the appeal was not perfected in the manner provided by law because the appellant failed to file the notice of appeal, the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:14(a)." (Pet. App. 20a-21a).[2]

2. Additionaly, Lisa's filing of her Petition for Appeal in the Supreme Court of Virginia was invalid because Lisa used a method of filing not authorized by the rules of the Supreme Court (Cont'd)

Lisa was on full notice of the requirement that she file a notice of appeal. The Supreme Court of Virginia has held for decades that a timely notice of appeal is both mandatory and jurisdictional. *Bd. of Supervisors of Fairfax County v. Bd. of Zoning App. of Fairfax County*, 271 Va. 336, 346, 626 S.E.2d 374, 380 (2006) ("A timely-filed notice of appeal is necessary to confer jurisdiction upon this Court to hear the appeal"); *Super Fresh Food Markets of Va., Inc. v. Ruffin*, 263 Va. 555, 563, 561 S.E.2d 734, 739 (2002) ("this Court lacks jurisdiction to consider any appeal" where timely notice of appeal was not filed); *Vaughn v. Vaughn*, 215 Va. 328, 329, 210 S.E.2d 140, 142 (1974) (rule requiring notice of appeal to be filed 30 days after final judgment is mandatory); *Mears v. Mears*, 206 Va. 444, 445-446, 143 S.E.2d 889, 890 (1965) (same); *Hall v. Hall*, 192 Va. 721, 724, 66 S.E.2d 595, 598 (1951) (same).

Lisa's procedural default is dispositive of her Petition to this Court, as it is well established that this Court will not review a decision below that is based on an independent and adequate state procedural ground. This Court has held specifically in a case arising from Virginia that a petitioner's failure to perfect his or her state court appeal as prescribed by the appellate procedural rules

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(Cont'd)

of Virginia. Because the petition was not sent by registered or certified mail, as provided by Rule 5:5(b), the petition was deemed filed when it arrived at the clerk's office, a day past the deadline, on February 21, 2007. After the clerk informed her that her petition was untimely, Lisa filed a motion asking that the court accept the untimely petition or grant a retroactive extension of time. The court did not grant these motions and instead dismissed her petition. (Pet. App. 20a-21a.)

precludes jurisdiction. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). *Coleman* reiterated the long-established rule that "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Id.* (citations omitted.) Jurisdiction is precluded "whether the state law ground is substantive or procedural." *Id.* As is the case here, "[i]n the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Id.* Even where a state intermediate appellate court clearly rests its decision on federal law, review is precluded when the petitioner fails to seek proper review with the state's highest court. *Hammerstein v. Super. Ct. of Ca.*, 341 U.S. 491, 492 (1951).

Coleman reflected this Court's longstanding respect for the right of state courts to set forth and enforce their appellate procedural rules:

> Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Callan v. Bransford*, 139 U.S. 197, 11 S.Ct. 519, 35 L.Ed. 144; *Brown v. Commonwealth of Massachusetts*, 144 U.S. 573, 12 S.Ct. 757, 36 L.Ed. 546; *Jacobi v. State*

> *of Alabama*, 187 U.S. 133, 23 S.Ct. 48, 47 L.Ed. 106; *Hulbert v. City of Chicago*, 202 U.S. 275, 281, 26 S.Ct. 617, 618, 50 L.Ed. 1026; *Newman v. Gates*, 204 U.S. 89, 27 S.Ct. 220, 51 L.Ed. 385; *Chesapeake & Ohio Railway Co. v. McDonald*, 214 U.S. 191, 195, 29 S.Ct. 546, 548, 53 L.Ed. 963.' *John v. Paullin*, 231 U.S. 583, 585, 34 S.Ct. 178, 58 L.Ed. 381.

Wolfe v. North Carolina, 364 U.S. 177, 195 (1960). Because Lisa did not comply with "the mode and time of invoking" the jurisdiction of the Supreme Court of Virginia, this Court's precedents preclude a grant of a Writ of *Certiorari.*

II. Because Vermont And Virginia Have Reached The Same Decision, There Is No Compelling Reason To Grant A Writ Of *Certiorari.*

Because the procedural default below is jurisdictional, an evaluation of the merits of Lisa's position is unnecessary. Nevertheless, assuming *arguendo* that the case had not been decided on an independent and adequate state procedural ground, the Petition should also be denied because Lisa has failed to present any compelling reason warranting a grant of *certiorari.*

Both the Supreme Court of Vermont and the Court of Appeals have unanimously rejected Petitioner's arguments, correctly holding that the PKPA governed the dispute and mandated that Vermont, where Lisa initially filed her custody action, retained jurisdiction

despite Lisa's later efforts to change strategy and file in Virginia. *See Miller-Jenkins*, 912 A.2d at 958-59; *Miller-Jenkins*, 49 Va. App. at 98, 637 S.E.2d at 335.

Both the Supreme Court of Vermont and the Court of Appeals applied the straightforward jurisdictional provisions of the PKPA and reached the same decision: Vermont has jurisdiction. Given that both courts reached the same result, this case is directly opposite the situation contemplated by Rule 10(b) of this Court where state courts of last resort reach conflicting decisions on an important federal question. *See* Sup. Ct. R. 10(b). Here the courts of last resort have reached the *same* conclusion. It is therefore axiomatic that there is no compelling reason present warranting the grant of a Writ of *Certiorari*.

Additionally, even a cursory reading of the questions that Lisa presents to this Court for review demonstrates that the Petition is not worthy of being granted. Lisa presents both highly misleading and irrelevant contentions as part of her attempt to argue issues that are not actually presented by the Virginia proceedings:

- Lisa repeatedly intimates that Janet's parental rights "arose" or were "arising" out of the civil union. (Pet. i, Questions 1, 2, 3.) However, the Supreme Court of Vermont was explicit that it was not recognizing Janet's parental rights based solely on the civil union and in fact that "***[m]any factors*** ... present here ... support a conclusion that Janet is a parent." *Miller-Jenkins*, 912 A.2d

at 970 (emphasis added);[3] *see also id.* at 971 ("Because so many factors are present in this case that allow us to hold that the nonbiologically-related partner is the child's parent, we need not address which factors may be dispositive on the issue in a closer case.").

- In an attempt to bolster the supposed relevance of the Defense of Marriage Act, 28 U.S.C. § 1738C ("DOMA"), Lisa maintains that DOMA was enacted after the PKPA. (Pet. i, Question 2.) Lisa neglects to mention that the PKPA was amended ***after*** DOMA specifically to clarify the PKPA's applicability to visitation orders, which is what is at issue in this case. *See* Pub. Law 104-199 (DOMA) (1996) and Public Law No. 105-374 (1998) (whereby it added in section 1 language that explicitly providing that the PKPA covers initial visitation determinations); *Bruner v. Tadlock*, 338 Ark. 34, 39-40, 991 S.W.2d 600, 603 (1999) (The purpose of Public Law 105-374 was to "make explicit" the commands of the PKPA

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3. The court explained that among the factors demonstrating Janet's parenthood

> are that . . . [i]t was the expectation and intent of both Lisa and Janet that Janet would be IMJ's parent. Janet participated in the decision that Lisa would be artificially inseminated to bear a child and participated actively in the prenatal care and birth. Both Lisa and Janet treated Janet as IMJ's parent during the time they resided together, and Lisa identified Janet as a parent of IMJ in the dissolution petition.

Miller-Jenkins, 912 A.2d at 970.

with respect to visitation orders and "hopefully [] "eliminate the hassles, obstacles, and delays that too often confront those who have valid visitation orders and are asking only that federal law be followed," citing 144 CONG. REC. 151, S12941 (daily ed. Oct. 21, 1998).).

- In a further attempt to suggest that this case implicates DOMA, Lisa argues that that law applies to her civil union with Janet, even though a Vermont civil union is not "treated as a marriage," 28 U.S.C. § 1738C, as Lisa herself admits with respect to matters such as the application of Vermont's marriage evasion statute. (Pet. i, Question 3; Pet. 24, n. 11.)

- Lisa attempts to resurrect her claims that the **Vermont** ruling violates her constitutional rights as a parent. (Pet. ii, Questions 4, 5.) Of course, Lisa was obligated to—and already did—raise that issue in her *certiorari* petition from the Supreme Court of Vermont's ruling, which this Court denied.

- Lisa characterizes Janet as a "legal stranger" to IMJ, (Pet. ii, Question 5), when that is precisely the opposite of what the Supreme Court of Vermont held. *Miller-Jenkins*, 912 A.2d at 970.

Consequently, having failed to present any compelling reason for a writ of *certiorari* to be granted, the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

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